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No. 88-1512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT J. FERENS and
MARGARET L. FERENS,

Petitioners,

v.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PFIZER INC. IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PFIZER INC. IN SUPPORT OF RESPONDENT

Pursuant to Rule 36.3 of the Rules of this Court, amicus, Pfizer Inc., hereby moves for leave to file the attached brief *amicus curiae*. Petitioners have refused consent for amicus to file a brief *amicus curiae* in this case.

Amicus is a Delaware corporation with its principal place of business in New York. It is a manufacturer of diverse and widely distributed product lines, which include pharmaceutical drugs. Amicus sells its products nationwide, indeed worldwide, and has cases

pending in federal and state courts throughout the country. The realities of the current abuse and threat of abuse by many plaintiffs of the privilege of transfer made available by § 1404(a) is of particular concern to amicus and many other companies similarly situated. Amicus seeks to bring to the attention of the Court some considerations relevant to the Court's disposition of this case that may either not be present in this case or may not be fully developed by the parties because of the somewhat unusual posture in which this case presents the question upon which the Court granted certiorari.

Amicus therefore respectfully requests leave to file the attached brief *amicus curiae*.

August 1, 1989 Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the plaintiff-initiated transfer of a case under the federal transfer statute is subject to the same standards and considerations that are generally applicable to defendant-initiated transfers under that statute.

2. If plaintiff-initiated transfers under the federal transfer statute are subject to considerations beyond those applicable to defendant-initiated transfers because of the plaintiff's broad power to choose the initial forum, what additional considerations should be brought to bear in a district court's exercise of its broad discretion to grant or deny a plaintiff-initiated transfer motion?

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Respondent.

**On Writ Of Certiorari To The
United States Court of Appeals
For The Third Circuit**

BRIEF OF PFIZER INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

Amicus is a Delaware corporation with its principal place of business in New York. It is a manufacturer of diverse and widely distributed product lines, which include pharmaceutical drugs. Amicus sells its products nationwide, indeed worldwide, and has cases pending in federal and state courts throughout the country. The realities of the current abuse and threat

of abuse by many plaintiffs of the privilege of transfer made available by § 1404(a) is of particular concern to amicus and many other companies similarly situated. Amicus seeks to bring to the attention of the Court some considerations relevant to the Court's disposition of this case that may either not be present in this case or may not be fully developed by the parties because of the somewhat unusual posture in which this case presents the question upon which the Court granted certiorari.

STATEMENT OF THE CASE

The facts material to the questions before the Court are not in dispute. Petitioner Albert J. Ferens, a resident of Pennsylvania, purchased a combine manufactured by respondent from a dealer in Pennsylvania in July 1981. So far as the record in this case discloses, the combine was neither designed nor manufactured in Mississippi. Nor have petitioners, so far as the record discloses, ever even been in the State of Mississippi. In July 1982, Mr. Ferens was injured while cleaning the combine in Pennsylvania.

Respondent is a Delaware corporation with its principal place of business in Illinois. The only contact between Mississippi and respondent disclosed by the record is that respondent has appointed a local registered agent in Mississippi authorized to accept service of process on its behalf.

As petitioners themselves were later to allege in their transfer motion, their claims against respondent had absolutely no connection whatsoever with Mississippi. Notwithstanding that, petitioners filed this action in the Southern District of Mississippi seeking damages identical to those they were already seeking

on a different legal theory in an action brought in the Western District of Pennsylvania. As the Court of Appeals stated, and as petitioners concede, petitioners brought their parallel action in the Southern District of Mississippi solely because, by doing so, they expected to gain the benefit of Mississippi's six-year statute of limitations.

Prior to and after the filing of this action in Mississippi, petitioners were fully aware of, and indeed alleged in their motion to transfer this case from Mississippi to Pennsylvania, that: (1) their claims had no connection with Mississippi; (2) no material witnesses were in Mississippi; (3) no relevant documents were in Mississippi; and (4) the action they had already filed in the Western District of Pennsylvania presented common questions of fact and law. *Ferens v. Deere & Co.*, 862 F.2d 31, 32-33 (3d Cir. 1988).

The pertinent distillation of these facts yields but a single conclusion: petitioners filed this action in Mississippi under the belief and the actuality that it was being filed in a paradigmatic inconvenient forum. The questions presented by this case are whether a transfer motion filed by a plaintiff, already possessed of the broad power to select a convenient or totally inconvenient forum in which to file suit, is to be evaluated by the transferor court on the basis of considerations beyond those that govern defendant-initiated transfers and, if so, what those additional considerations are.

SUMMARY OF ARGUMENT

The doctrine of *forum non conveniens* and the statute which codified that doctrine in the federal system, 28 U.S.C. § 1404(a), serve the purpose of promoting

efficiency in the conduct of litigation while ensuring that justice is done to both plaintiffs and defendants in the process of achieving efficiency. The need for such a transfer device arises out of the basic structure of our litigation system under which plaintiffs start lawsuits, and have wide latitude to select from among various possible forums in bringing a law suit. The transfer device is designed, in part, to temper this initial and substantial power of plaintiffs to select a forum by ensuring that a plaintiff, once having selected its preferred forum, may not then unilaterally and successfully demand that the defendant be required to defend against that claim in yet another forum over the latter's objection.

In enacting § 1404(a), Congress did not expressly consider the implications of that statute with respect to choice of law issues generated by the inevitable contest between plaintiffs and defendants to secure the benefit of the law more favorable to their respective causes. In the forty years since § 1404(a) was enacted, the lower federal courts have become enmeshed in a largely futile and unending effort to rationalize and apply unenacted choice of law principles to complex circumstances in which doing justice to the litigants, even rough justice, is not a straightforward task. Defendants may be expected to attempt to utilize the transfer statute to defeat or chip away at the natural advantage plaintiffs enjoy in selecting the forum. This Court made clear in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), that § 1404(a) may generally not be used by defendants in such a fashion.

The utilization of § 1404(a) by plaintiffs, however, presents a potential for abuse because if a plaintiff first chooses a forum, including an inconvenient one,

and then successfully invokes § 1404(a), the plaintiff will have succeeded in choosing not only the initial forum but thereafter a second forum that, absent changed circumstances following its initial selection, the plaintiff presumptively viewed as the most convenient forum in which to litigate the case in the first instance. Thus, a plaintiff-initiated transfer necessarily raises the question whether § 1404(a) should be interpreted to enhance the already superior position of the plaintiff as regards forum selection.

Several federal district courts that have confronted this issue as transferor courts *prior to transfer* have concluded that, as a general matter, a plaintiff must—absent the cooperation of the defendant—abide its initial choice of the forum. These courts have, at the same time, recognized that circumstances arising subsequently to a plaintiff's initial choice of a forum may justify a plaintiff's seeking to avail itself of § 1404(a). Amicus believes that this common sense solution, which recognizes the fundamental distinctions between plaintiff-initiated and defendant-initiated transfers, should be adopted by the Court in an appropriate case.

Amicus also respectfully suggests that the case at bar is not an appropriate vehicle for this Court's consideration of this important question. Respondent did not oppose petitioners' transfer motion in the transferor court. Petitioners, for their part, do not contend that respondent waived its rights under § 1404(a) by its failure to assert these rights in the Southern District of Mississippi. The result is that the case before the Court involves an abstract and relatively minor controversy over the choice of law implications of a plaintiff-initiated transfer that should be, in the view

of amicus, of only marginal concern to the Court in construing § 1404(a) in the context of plaintiff-initiated transfers.

ARGUMENT

I

INTRODUCTION

The *forum non conveniens* doctrine, as implemented by the federal transfer statute, 28 U.S.C. § 1404(a), vests broad discretion in a district court to transfer—or refuse to transfer—a case to another district based upon "considerations of convenience and justice." *Van Dusen* v. *Barrack*, 376 U.S. 612, 616 (1964). It is, at the very least, counterintuitive that a plaintiff, having deliberately chosen to bring its action in a manifestly inconvenient forum (or even a convenient forum), could—absent the consent of the defendant[1]—avail itself of this essentially equitable doctrine and demand that the inconvenience already imposed on the defendant by virtue of the plaintiff's deliberate initial choice of an inconvenient forum be disregarded and the action transferred to another forum to suit the plaintiff's desires.

If the only criterion for transfer established by § 1404(a) were that of "convenience" to the parties and witnesses *after a transfer has occurred*, such a time-bound view of the concept of convenience would weigh in favor of the grant of a transfer motion on *the facts of this case*.[2] There is, however, more to the proper application of § 1404(a) to plaintiff-initiated transfers than simply whether the Western District of Pennsylvania was, at least after the transfer, regarded by petitioners and respondent as a more convenient forum.

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[1] The questions presented by this case arise in a somewhat unusual posture because, as petitioners correctly point out, Br. of Petrs., at 5, respondent did not oppose their transfer motion in the Southern District of Mississippi. Nor did respondent request the Southern District of Mississippi to qualify or condition a transfer on, among other possibilities, petitioners' acceptance of Pennsylvania's two-year statute of limitations. Instead, respondent waited until the transfer was an accomplished fact to assert a right, necessarily arising under § 1404(a) for present purposes, to application of Pennsylvania's two-year statute of limitations. The parties have not directly addressed the question whether respondent should have asserted in the Southern District of Mississippi the right under § 1404(a) that it later asserted in the Western District of Pennsylvania after transfer. *Cf. Hoffman* v. *Blaski*, 363 U.S. 335, 345-50 (1960) (Frankfurter, J., dissenting). It would appear to amicus that even if respondent should have done so, petitioners have themselves waived their right to complain because they apparently did not present a "waiver" argument in opposition to respondent's motion to dismiss the complaint on statute of limitations grounds in the Western District of Pennsylvania or in the Third Circuit. Amicus does submit, however, that the important question on which the Court granted certiorari should be decided from the perspective of what considerations should illuminate the decision of a "transferor" court confronted with a transfer motion, not from the perspective of a transferee district court in which the transfer is treated by the parties as a *fait accompli*. *See also* notes 3 & 7, *infra*.

[2] As discussed in note 5 *infra*, respondent in this case, having already been required to hire counsel to protect its interests in this case in the Southern District of Mississippi, was not likely to object to transfer of this case to a district in which most of the potential witnesses were located and in which respondent had already undergone the burden of obtaining counsel to defend it in the parallel action brought earlier in the Western District of Pennsylvania by petitioners.

It will, generally speaking, be presumptively inconvenient for any defendant to be haled into a district court that has no connection with the case and which is located in a distant State in which the defendant has no substantial physical presence. Thus, it was undoubtedly inconvenient for respondent to have to retain Mississippi counsel and to respond to petitioners' complaint in the Southern District of Mississippi.

That initial inconvenience faced by respondent and similarly situated defendants is built into our legal system. As Justice Jackson observed:

> It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Gulf Oil Corp. v. *Gilbert*, 330 U.S. 501, 508 (1947) (footnote omitted). It is difficult, however, to believe that Justice Jackson and the Court for which he wrote in *Gilbert* would not be startled at the prospect of a plaintiff's attempting, on the facts of the case at bar, to avail itself of a doctrine conceived, and a federal transfer statute enacted, for the purpose of curbing the power of plaintiffs to "vex," "harass" or "oppress" defendants. Had respondent objected to the transfer in the Southern District of Mississippi, its objections would likely have been accorded considerable weight.[5]

[5] Respondent's view of "convenience" was, of course, appar-

The initial inconvenience to a defendant in having to attend to a complaint and other initiatives by a plaintiff such as occurred in this case in the Southern District of Mississippi is a factor to be weighed heavily in applying § 1404(a) to a plaintiff-initiated transfer. But "convenience" is not the sole statutory criterion by which a district court is to decide whether, and under what conditions, a motion to transfer under § 1404(a) shall (or shall not) be granted. As emphasized in *Van Dusen*, § 1404(a) requires that the broad discretion vested in a "transferor" court be exercised to achieve both convenience "and justice." Under the language of § 1404(a), the question is whether considerations of both "convenience" *and* "justice" should have provided petitioners an unqualified right to the convenience of a Pennsylvania forum in a situation in which they deliberately chose to bring the action initially in a forum that was "convenient" only in the sense that by bringing the action in Mississippi, they hoped to capture Mississippi's more favorable statute of limitations and then take that prize back home to Pennsylvania. As amicus shall now demonstrate, construing § 1404(a) to authorize plaintiffs to enhance their existing power to select the initial forum would

ently colored by its expectation that the transfer of the case might result in application of Pennsylvania's two-year statute of limitations and, as occurred, dismissal of the action altogether as barred by that limitations statute. As amicus discusses at the outset of part II.B. below, however, petitioners (and, to some extent, respondent) have framed the question in this case as involving the appropriate law to apply after transfer rather than as whether petitioners had an unqualified right to the transfer in the first instance. This aspect of the case renders it an extremely awkward vehicle by which to decide how § 1404(a) should be applied to plaintiff-initiated transfers. *See* note 1, *supra*, and note 9, *infra*.

be inconsistent with the concept of justice embodied in § 1404(a).

II

THE FEDERAL TRANSFER STATUTE DOES NOT ENTITLE A PLAINTIFF WHO DELIBERATELY FILES AN ACTION IN AN INCONVENIENT FORUM TO AN UNCONDITIONAL TRANSFER OF ITS CASE TO ANOTHER FORUM

A. Plaintiff-initiated Transfers Under § 1404(a) Implicate Concerns of Convenience and Justice That Are Not Present in Defendant-initiated Transfers

It is common ground that the Court, in *Van Dusen* v. *Barrack*, did not decide

> whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) . . . .

376 U.S., at 640 (footnote omitted). That the *Van Dusen* Court expressly recognized that a plaintiff-initiated transfer motion might well involve different considerations than a transfer initiated by a defendant is not surprising. First, because of the "necessary generality" of the federal venue statutes, *Gulf Oil Corp.* v. *Gilbert*, 330 U.S., at 507, the Court was certainly aware that, in initially selecting a federal district in which to bring its action, a plaintiff enjoys a broad power to engage in "forum shopping." Justice Frankfurter put this point in a way that captures the essence of the issue under review in this case, stating that § 1404(a)

> operates to temper only to a slight degree the enormous "discrimination" inherent in our system of litigation whereby the sole choice of forum, from among those where service is possible and venue unobjectionable, is placed with the plaintiff. The plaintiff may choose from among these forums at will; under § 1404(a) the defendant must satisfy a very substantial burden of demonstrating where "justice" and "convenience" lie, in order to have his objection . . . respected.

Sullivan v. *Behimer*, 363 U.S. 335, 365-66 (1960) (Frankfurter, J., dissenting).

Whether § 1404(a) should be interpreted to enhance, rather than temper—even to just a "slight degree,"—the enormous existing power of a plaintiff to choose the initial forum by providing the plaintiff with an unqualified right to select *two successive forums* was quite likely a question that would not have occurred to the Court in the context of a case in which the defendant was attempting "to defeat the state-law advantages that might accrue [to the plaintiff] from the exercise of [its] venue privilege . . . ." *Van Dusen* v. *Barrack*, 376 U.S., at 635.

Second, in his brief in *Van Dusen* the Solicitor General had pointed out that prior to the enactment of § 1404(a), it was not unusual for a court to order dismissal of an action on *forum non conveniens* grounds only if the defendant seeking that dismissal would agree to submit himself voluntarily to the jurisdiction of the more convenient forum. This condition was attached in the context of cases in which "the plaintiff was forced originally to bring his suit

in an inconvenient forum by his inability to serve defendant elsewhere . . . ." Br. for United States *et al.*, at 14 n.19 (filed in Case No. 80, Oct. Term 1963). Thus, the *Van Dusen* Court was acutely aware that the application of the *forum non conveniens* doctrine (and, therefore, § 1404(a)) could well depend on a variety of factors, including whether the plaintiff had been initially "forced" into a forum because of factors beyond the plaintiff's control.[4]

Third, in expressly noting the distinction between plaintiff-initiated and defendant-initiated transfers under § 1404(a), the *Van Dusen* Court analogized to cases decided under 28 U.S.C. § 1406(a)[5] in which a plaintiff, having brought a case in a district in which venue was improper, sought transfer of the case to another district court and claimed that the transfer would meet the requirements of § 1406(a) that it be "in the interest of justice." *Van Dusen* v. *Barrack*, 376 U.S., at 640 n.42 (referencing *id.*, at 634 n.29). One of the cases discussed by the *Van Dusen* Court on this point involved a plaintiff who had filed an action in one district in which venue was improper and who then sought a transfer to another district and to take the first district's statute of limitations

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[4] It does not appear that the record in this case establishes what, if anything, may have prevented petitioners from bringing their action in Pennsylvania prior to the running of Pennsylvania's two-year statute of limitations.

[5] Under 28 U.S.C. § 1406(a),

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

with him. *Viaggio* v. *Field*, 177 F. Supp. 643 (D. Md. 1959). The *Viaggio* court held that a transfer under such circumstances would not be "in the interests of justice," *id.*, at 647-48, and equated an attempt by a plaintiff to take advantage of that transfer statute in that fashion with a defendant's trying to gain an advantage by invoking § 1404(a). At a minimum, the *Van Dusen* Court's citation and quotation of *Viaggio* with apparent approval establishes that that Court recognized the potential that plaintiffs, as well as defendants, could abuse the right to transfer cases under both § 1404(a) and § 1406(a) and that such abuses were subject to judicial control under the requirement that transfers under either statute must be in the interest of justice.[6]

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[6] As the *Van Dusen* Court indicated, the provisions of § 1406(a) are "analogous" to § 1404(a), those provisions "share the same statutory context," and they contain similar language in several respects. 376 U.S., at 621 n.11. Thus, the two provisions "may be compared" in interpreting the meaning of phraseology common to both. *Id.*, at 634. These observations cast considerable doubt on the reasoning of cases such as *Martin* v. *Stokes*, 623 F.2d 469 (6th Cir. 1980), in which courts have concluded that in cases transferred pursuant to § 1406(a), the law of the transferee jurisdiction will always apply, while transfers under § 1404(a) will always result in application of the law of the transferor jurisdiction. Such cases do not appear to admit the broad discretion granted by both statutes to a transferor district court, taking a potentially large number of diverse factors into account in making the transfer decision and attaching conditions to a transfer order (directly or by stipulation of the parties) that will advance the interests of convenience and justice. Such cases also fail to address the fundamental issue whether there are valid distinctions between defendant-initiated and plaintiff-initiated transfers under § 1404(a) that should be taken into consideration in the transferor court's exercise of its broad discretion.

B. Considerations Drawn from the Policies Animating the Doctrine of *Forum Non Conveniens* as Implemented by § 1404(a) Militate Decisively Against the Unconditional Right in Plaintiffs to Transfer of an Action Knowingly and Deliberately Brought in an Inconvenient Forum

Petitioners' position on the merits is quite clear: because they brought this action in a proper venue in which they could validly obtain jurisdiction over respondent—the Southern District of Mississippi—they were entitled as of right to a transfer of the case to a forum more convenient than the one they initially chose and to have Mississippi's statute of limitations applied in the transferee forum. Amicus submits that petitioners' assertion of an unqualified "right" to application of Mississippi's statute of limitations after transfer is a red herring. Under the strictest interpretation of *Van Dusen*, it would appear that if petitioners had an unqualified right under § 1404(a) to transfer of this case to the Western District of Pennsylvania, then that court was obliged to apply Mississippi's statute of limitations. The question in this case, however, is whether § 1404(a) granted petitioners such an unqualified right to transfer in the first instance.[7]

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[7] Not surprisingly, petitioners devote virtually the entirety of their brief to this red herring. Correspondingly, their brief—which contains only occasional references to the language of § 1404(a)—does not even discuss how the concept of convenience might be implicated in the "right" of a plaintiff to transfer its action from an inconvenient forum the plaintiff chose, or what the words of the statute, "in the interest of justice," might mean with respect to plaintiff-initiated transfers. Petitioners have, for self-serving reasons, simply asked the wrong question.

Amicus believes that the potentially different considerations involved in plaintiff-initiated transfer motions may generally be analyzed under two headings. First, what is the nature of the burden that a plaintiff invoking § 1404(a) must meet in order to establish its entitlement to an unqualified transfer of its action to another forum? Second, what additional considerations should govern the application of § 1404(a) when a plaintiff, rather than a defendant, invokes that statute? Amicus will address each of these related considerations in turn.

1. The Burden of Persuasion

As Justice Jackson observed in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S., at 508, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." This observation, although made just prior to the enactment of § 1404(a) in 1948, has been routinely applied by the lower federal courts in deciding defendant-initiated transfer motions. *See, e.g., Magnavox Co.* v. *Bally Manufacturing Co.*, 414 F. Supp. 891, 892 (D. Ill. 1976) (quoting and adopting *Gulf Oil Corp.* v. *Gilbert*, *supra*, on this point).

The substantial burden on defendants seeking a transfer under § 1404(a) is, however, a two-edged sword, as has also been recognized by the lower federal courts. Thus, "[i]t is generally held that a transfer under § 1404(a) is not available to a plaintiff who has voluntarily chosen his own forum .... [In] the absence of a clear showing ...., plaintiff will be held to the forum which he has selected." *Anschell* v. *Sackheim*, 145 F. Supp. 447, 452 (D.N.J. 1956).[8] As dis-

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[8] In one of the first cases interpreting § 1404(a), a district

cussed above, § 1404(a) was enacted to "temper" the ability of a plaintiff to engage in "discrimination" against a defendant through the ability to choose among a number of available convenient or inconvenient venues in which to file its action initially. *Sullivan* v. *Behimer*, 363 U.S.; at 365-66 (Frankfurter, J., dissenting). Hence, the burden on a plaintiff to justify a transfer of its action should be, as a matter of common sense, greater than the burden imposed upon a defendant.

2. A Plaintiff Should Be Required To Show Substantial Changed Circumstances in Order To Establish an Unqualified Right to a Transfer under § 1404(a)

To avoid the kind of "double" discrimination that is inherent in a plaintiff's invocation of § 1404(a), the federal district courts—who are closest to the give-and-take of litigation and to the tactics of plaintiffs and defendants in attempting to secure every possible advantage—have, with relative uniformity, concluded that a plaintiff, in order to invoke § 1404(a) successfully, must be able to establish the occurrence of an event subsequently to the filing of its action that justifies the inconvenience inherent in the transfer of a case after proceedings have begun. As Judge Lasker has put this principle: "When a plaintiff is a movant under 1404(a) he must show a change in circumstances since the filing of suit." *Harry Rich Corp.* v. *Curtiss-Wright Corp.*, 308 F. Supp. 1114, 1118 (S.D.N.Y. 1969). *Accord*, *James* v. *Daley and Lewis*, 406 F. Supp. 645, 648 (D. Del. 1976); *Roberts Brothers, Inc.* v. *Kurta Brothers*, 231 F. Supp. 163, 167 (D.N.J. 1964).

court took the position that § 1404(a) "is not available to plaintiffs who voluntarily choose their own forum." *Barnhart* v. *John B. Rogers Producing Co.*, 86 F. Supp. 595, 599 (N.D. Ohio 1949). Although that position would not seem to be required by the language of § 1404(a), which does not prohibit invocation of § 1404(a) by plaintiffs, it nevertheless reflects the common sense view that a plaintiff, having chosen its forum, should not be able to hale the defendant into yet another court over the defendant's objection absent compelling reasons.

Such a bright-line rule is fully consonant with and arises out of § 1404(a)'s requirement that transfers must promote both convenience and justice. As for convenience, the rule would recognize that the defendant—not the plaintiff—should generally hold the keys to a transfer where the defendant has already been haled into a manifestly inconvenient forum, has hired one set of counsel to represent him in that forum, and is now faced with the further inconvenience and expense of repeating that exercise and incurring additional expense in a different forum.[9]

[9] In most, if not the overwhelming majority, of cases in which the transfer issue arises, there will not be—as in the case at the bar—a pending parallel action in the proposed transferee district, the pendency of which would tend to ameliorate the burden and expense on the defendant to obtain new counsel licensed and otherwise capable of representing the defendant in the proposed transferee court. The fortuitous circumstance of this case that an earlier, parallel action had been filed by petitioners should not, however, dictate this Court's resolution of the broader question reserved by the Court in *Van Dusen*. Once a defendant in the more typical case has undergone the initial inconvenience of defending itself in a forum having no connection with the case itself, that defendant's views on the propriety of a transfer should be accorded special deference by the transferor court. This is perhaps but another way of saying that a plaintiff, having inconvenienced the defendant once, bears a heavy burden to justify a transfer over the defendant's objection.

As for serving the interests of justice, the interpretation of § 1404(a) proposed by amicus would, to a "slight degree," constrain the ability of a plaintiff to select an initial forum, be it convenient or, as in this case, manifestly and deliberately inconvenient, and then to transfer the case to another forum believed by the plaintiff to be more convenient for the conduct of what remains of the case. The defendant, for a wide variety of reasons, may be prepared to agree to such a transfer in an arrangement that resolves any conflict of law issue that may arise. Amicus believes, however, that in the absence of such an agreement, the defendant should have the power to keep the litigation in the forum initially selected by the plaintiff, absent intervening circumstances. In short, a plaintiff who has knowingly and deliberately chosen a particular forum will have to abide that decision unless subsequent events *beyond its control* persuade the transferor court that justice to the plaintiff *and* the defendant requires the initial venue choice of the former be revisited and that justice to *all* the litigants would be promoted by a transfer.

The standard proposed by amicus would not introduce inflexibility into a system that is also designed to address issues such as inconvenience to witnesses. A plaintiff who brings an action in a manifestly inconvenient forum from the standpoint of the location of probable witnesses does so with the full awareness that witnesses it may want to call may be subject to a deposition subpoena but not to a trial subpoena. *Compare* Fed. R. Civ. P. 45(d) *with* Fed. R. Civ. P. 45(e). There is surely nothing "unjust" about a result in which the plaintiff, having chosen a forum in which to litigate, is thereafter faced with having to put on

parts of its case through depositions rather than live testimony because material witnesses not subject to a trial subpoena decline to appear voluntarily in a district court. Indeed, in that situation the defendant could well be in the same position and could, if it chose, invoke § 1404(a) or agree with plaintiff to a transfer.

Furthermore, and as the Court recognized in *Van Dusen*, courts dealing with defendants' motions to transfer "have relied at least in part upon a transfer-on-condition or estoppel approach to grant transfer and protect the plaintiff." 376 U.S., at 631 n.27. This *flexible* tool would be equally available *to protect the defendant* in cases involving plaintiff-initiated transfers.[10]

Finally, the bright-line approach advocated by amicus would minimize the impact of choice-of-law considerations in the application of § 1404(a), considerations that have generated a wide variety of sometimes inconsistent approaches[11] to the application of § 1404(a). Such minimization is especially called for given the complexity of choice-of-law rules in federal diversity cases and the fact that in enacting § 1404(a), neither Congress nor the Advisory Committee re-

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[10] Had respondent objected to the transfer of this case, the test proposed by amicus would seemingly have required the Southern District of Mississippi to deny petitioners' § 1404(a) motion because nothing appears, on this record, to have occurred subsequently to the filing of this action that would constitute changed circumstances.

[11] *See* Note, *Choice of Law After Transfer of Venue*, 75 Yale L.J. 90, 91-92 & nn.12-16 (1965).

sponsible for that provision even focused on the choice-of-law issues raised by § 1404(a).[10]

III

THE PETITION SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

It is respectfully submitted that the peculiar facts of this case, including the parallel Pennsylvania action, respondent's failure to oppose petitioners' transfer motion, and petitioners' failure to present a "waiver" argument in response thereto, render this case an inadequate and inappropriate vehicle from which to derive a rule governing plaintiff-initiated transfers under § 1404(a). Accordingly, amicus respectfully suggests that the Court dismiss the petition as improvidently granted.

CONCLUSION

Litigants may be expected to take every reasonable action and pursue every course legitimately open to them under the statutes and rules governing litigation to secure an advantage over their opponents. The playing field upon which the transfer "game" is played is not level at any time during that game. Plaintiffs in search of law, courts or juries perceived to be friendly to their cause have wide latitude to pick their forums. Section 1404(a), both by its language, intent and derivation, accepts that "discriminatory" tilt but tempers it with fundamental notions of convenience and fairness. Section 1404(a) does not, as petitioners argue to the Court, authorize an increase in the existing disparity between plaintiffs and defendants by

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[10] *Id.*, at 94.

permitting plaintiffs an unqualified second bite at the forum-shopping apple.

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